No. 83-1298

In the Supreme Court of the United States

OCTOBER TERM, 1983

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 4-23, PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR AND AMERICAN PETROFINA COMPANY OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether employees may challenge and the Occupational Safety and Health Review Commission may review a settlement agreement between the Secretary of Labor and an employer cited for violating the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, where the challenge is based on grounds other than the reasonableness of the period allowed in the settlement for abatement of the violation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes and rule:

Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 718 F.2d 1341. The order of the Occupational Safety and Health Review Commission (Pet. App. 25a) is not reported. The opinion of the administrative law judge in OSHRC Docket No. 80-1671 (Pet. App. 31a-36a) is summarized at 1981 O.S.H. Dec. (CCH) para. 25,394. The opinion of the administrative law judge in OSHRC Docket No. 79-6847 (Pet. App. 37a-45a) is summarized at 1981 O.S.H. Dec. (CCH) para. 25,638.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1983. The petition for a writ of certiorari was filed on February 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the Oil, Chemical and Atomic Workers International Union and its Local 4-23, represent employees who in the fall of 1979 worked at the Port Arthur, Texas, oil refinery of respondent American Petrofina Co. of Texas. During that time, Occupational Safety and Health Administration (OSHA) inspectors investigated the refinery to determine whether the company was complying with the Occupational Safety and Health Act of 1970 (the Act or OSH Act), 29 U.S.C. 651 *et seq.* Pet. App. 2a. As a result of the inspections, the Secretary of Labor issued four citations and notifications of proposed penalties for violations of the Act. See 29 U.S.C. 658(a), 659(a). The company contested these citations. See 29 U.S.C. 659(c). The Occupational Safety and Health Review Commission consolidated the citations into two cases and assigned them to two separate administrative law judges for hearings. Shortly thereafter, petitioners elected to participate as parties to the proceedings. Pet. App. 2a-3a.

Before the hearings were to take place, the Secretary and the company settled both cases (Pet. App. 4a). The Secretary reduced the characterization of the violations from "serious" to "non-serious" and also reduced the proposed penalties. In exchange, the company withdrew its notices of contest. *Ibid.* Petitioners participated in the settlement negotiations but did not join the agreement because they objected to the recharacterization of the violations and to representations in the agreement that abatement had occurred (*id.* at 4a & n.7).

The administrative law judges approved the settlement agreements. The judge in OSHRC Docket No. 80-1671 held that petitioners lacked standing to object to the agreement because their challenge was not to the reasonableness of the abatement period (Pet. App. 35a). He also held that petitioners had meaningfully participated in the settlement negotiations and that the settlement was consistent with the provisions and objectives of the Act (*id.* at 35a-36a). The judge in OSHRC Docket No. 79-6847 held that characterization of a violation is a matter within the Secretary's prosecutorial discretion under the Act and found that the cited conditions had in fact been abated (*id.* at 41a-42a). The Commission granted petitioners' request for discretionary review of these rulings (*id.* at 28a, 29a) and denied the motions of the Secretary and the company to vacate the order directing review (*id.* at 25a-26a).

The Secretary filed a petition for review with the court of appeals. The Secretary contended that once an employer withdraws its notice of contest of a citation, the employees may not challenge a settlement agreement on grounds other than the reasonableness of the abatement period. Petitioners, on the other hand, maintained that the employees could challenge the settlement on other grounds as well. The court accepted the Secretary's interpretation.[1] It therefore vacated

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[1]As a threshold matter, the court held (Pet. App. 4a-8a) that the Commission's denial of the Secretary's motion was appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949).

The majority also construed Section 10(c) of the Act, 29 U.S.C. 659(c), and Fed. R. Civ. P. 24(a) as granting employees " 'equal standing with the original parties' " (Pet. App. 18a (citation omitted)). The court therefore expressed agreement with petitioners' contention that "employees may participate fully as parties once the employer has filed a notice of contest, and hence are not limited to challenging the reasonableness of the abatement period at such a proceeding" (*id.* at 23a). Judge Jolly disagreed with this dictum (*id.* at 24a). This question is not presented here.

the Commission's order and remanded for dismissal of the petition for review (Pet. App. 24a). Two judges observed (*id.* at 21a) that "[t]he statutory language is susceptible of either construction, and either result can be viewed as part of a coherent statutory scheme." While stating that they were "inclined to favor" petitioners' interpretation, the judges noted that three courts of appeals had held to the contrary and that a fourth had accepted the Secretary's interpretation in dictum (*id.* at 22a). Thus, to avoid "administrative chaos" and "a gross disparity * * * between the Secretary's ability to settle cases" in the various circuits, they followed the prior court of appeals' decisions (*id.* at 23a). The third member of the panel concurred in the result because he found the Secretary's interpretation more persuasive (*id.* at 24a).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 6-9) that review is justified because the courts of appeals have reached conflicting conclusions on the question of the Secretary's authority to settle OSHA citations over the objections of employees and without Commission review. That contention is wholly without merit.

As petitioners acknowledge (Pet. 8), the decision of the court below upholding the Secretary's settlement authority is consistent with the decisions of every other court of appeals that has considered the question. See *Donovan* v. *International Union, Allied Industrial Workers*, 722 F.2d 1415 (8th Cir. 1983); *Donovan* v. *United Steelworkers*, 722 F.2d 1158 (4th Cir. 1983) (per curiam); *Donovan* v. *OSHRC*, 713 F.2d 918 (2d Cir. 1983); *OCAW* v. *OSHRC*, 671 F.2d 643 (D.C. Cir.) (per curiam) (dictum), cert.

denied, 459 U.S. 905 (1982); *Marshall* v. *OCAW*, 647 F.2d 383 (3d Cir. 1981); *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), cert. denied, 449 U.S. 1061 (1980). See also *Marshall* v. *OSHRC*, 635 F.2d 544 (6th Cir. 1980 (citation omitted) " 'Congress intended to preclude employees and their representatives from usurping the Secretary's prosecutorial discretion [except insofar as they may contest the reasonableness of the abatement period]' "). Moreover, contrary to petitioners' assertion (Pet. 8), there is no conflict in reasoning between the decision below and the decisions of the other courts of appeals. The court below found the Secretary's interpretation of the Act to be "logical" (Pet. App. 21a), "reasonabl[e]" (*id.* at 23a), and "part of a coherent statutory scheme" (*id.* at 21a).

It is beside the point that two members of the panel were "inclined to favor" the contrary interpretation (Pet. App. 22a) and based their decision on a commendable desire to avoid "administrative chaos" and a circuit conflict (*id.* at 23a). In construing the Act, a court must uphold a reasonable interpretation of the Secretary that furthers the statutory purpose and complements the statutory scheme (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11, 13 (1980)) even if that interpretation is not the only reasonable one or the result that the court would have reached de novo. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[2]

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[2]Petitioners argue (Pet. 10-12) that the Commission's interpretation of the Act, with which they agree, is entitled to deference. The Commission, however, is not a policymaking agency. *Donovan* v. *International Union, Allied Industrial Workers*, 722 F.2d at 1419; *Donovan* v. *OSHRC*, 713 F.2d at 930; *Marshall* v. *OSHRC*, 635 F.2d at 547; *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d at 1183, 1184; *Dale M. Madden Construction, Inc.* v. *Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). Its interpretations of the Act are therefore "not entitled to any special deference from the courts." *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980) (citations omitted).

Thus, the cases are "really in harmony," and there is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" that requires resolution by this Court. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 392, 393 (1923).[3]

2. Petitioners incorrectly assert (Pet. 9-21) that the court of appeals' holding is contrary to the language, structure, and purpose of the Act.

a. Petitioners note that Section 10(c) of the Act, 29 U.S.C. 659(c), provides that the Commission shall afford a hearing to an employer that contests a citation and "shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief * * *."[4]

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[3]The Fifth Circuit has shown no sign of retreating from its holding in this case. It recently followed the decision below in *Donovan* v. *International Association of Bridge, Structural & Ornamental Iron Workers*, 725 F.2d 994 (1984) (per curiam), in which it reversed a Commission order setting a hearing on employee objections to a settlement agreement and remanded to the Commission for dismissal of the petition for review. The question of the Secretary's settlement authority is also pending in the Sixth Circuit, *Donovan* v. *United Transportation Union*, No. 82-3771; in the Seventh Circuit, *Donovan* v. *Allied Industrial Workers*, No. 83-2831; and in the Eleventh Circuit, *Donovan* v. *International Chemical Workers Union*, No. 82-7322.

[4]Section 10(c) of the Act, 29 U.S.C. 659(c), provides in full:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5[, United States Code,] but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on

Petitioners argue (Pet. 13-14) that any proceeding in which the Commission's jurisdiction has been invoked must end with the issuance of a Commission order and that therefore the Commission may review a settlement agreement that would resolve a contested case. This argument ignores the fact that an uncontested citation is "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. 659(a). An employer's withdrawal of its notice of contest as part of a settlement thus produces the same result that would have occurred if the employer had never contested the citation — an abatement requirement and penalty assessment that are "deemed a final order of the Commission."

b. Petitioners next contend (Pet. 14) that allowing employees to object to a settlement implements Section 10(c)'s direction to the Commission to provide affected employees with "an opportunity to participate as parties to hearings" and comports with the notion that "parties" are entitled to participate fully in ligitation. However, "[t]hat section of the Act confers a procedural right on employees; it does not establish an independent entitlement to a hearing on the employees' objections to the substantive elements of an abatement plan. '[T]hat question must turn on what

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findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirement in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

rights, if any, the Act confers upon [employees].' " *Donovan* v. *OSHRC*, 713 F.2d at 927-928 (footnotes omitted; brackets in original). Just because employees are permitted to become parties to any hearing on a contested citation, it does not follow that they may object to a settlement once the employer's notice of contest is withdrawn. As the court below recognized (Pet. App. 21a), Section 10(c) may logically be construed "as granting conditional intervenor status to the employees, the condition being the continued participation of the employer."

c. Equally unpersuasive is petitioners' argument (Pet. 14-16) that Commission review furthers the policy underlying creation of the Commission, which petitioners identify as separation of the enforcement and adjudication functions under the Act.[5] In the first place, Congress did not require Commission involvement in every enforcement action brought by the Secretary. The Section 10(a) proscription against review of uncontested citations evidences Congress's willingness to entrust to the Secretary alone the appropriate abatement of hazards in a large number of

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[5]Petitioners note (Pet. 16 n.20) that in deciding to separate prosecutorial and adjudicatory functions under the Act, Congress had in mind the model of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* They assert (Pet. 16 n.20) that Congress also had in mind cases under the NLRA holding that a charging party may challenge a proposed settlement of an unfair labor pratice complaint and that therefore Congress could not have intended any lesser role for complaining employees under the OSH Act. Petitioners overlook the fact that at the time the OSH Act was passed, one court of appeals had held that a charging party under the NLRA has no right to a hearing on its objections to a settlement agreement. See *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d 795 (2d Cir. 1964). Congress cannot be presumed to have adopted one view over the other without some affirmative indication of which it preferred. *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 10.

cases.[6] Second, review of settlements retards rather than advances the other policy underlying the Commission's creation—providing "a very quick way" of dealing with contested cases. Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, P.L. 91-596)* 463 (Comm. Print 1971) (remarks of Sen. Javits). Because the requirement to abate violations is stayed until the Commission enters a final order on an employer-contested citation (see 29 U.S.C. 659(b)), Commission review of settlements " 'delays the day when a final order requiring abatement may be entered.' " *Marshall* v. *OCAW*, 647 F.2d at 387 (citation omitted). Indeed, were the Commission to issue its order "approving" a settlement immediately upon receiving the agreement, that order would be stayed for 30 days until finality attached. 29 U.S.C. 659(c). Thus, even in the best case, Commission involvement, instead of being "a very quick

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[6]The non-reviewability of uncontested citations also belies petitioners' related assertion (Pet. 17-18) that Commission review of settlements is necessary to fetter the Secretary's prosecutorial discretion. Since there is no qualitative difference between the Secretary's determination to issue a citation in the first place and his decision to modify one, *Donovan* v. *OSHRC*, 713 F.2d at 927, if the Secretary's discretion is not reviewable in situations where the employer does not contest the original citation, then it should not be reviewable in situations where the employer does not contest the modified citation.

Moreover, no authority cited by petitioners (Pet. 18 n.22) as limiting the Secretary's prosecutorial discretion compels a different result. Thus, while 29 U.S.C. 657(f) grants employees the right to "request an inspection" of their workplace, the Secretary need only conduct such an inspection if he determines there are reasonable grounds to believe that a violation or danger exists. After inspection, the Secretary must issue a citation only if he believes the Act has been violated. See 29 U.S.C. 658(a). And employee participation as a party in an employer-initiated proceeding is in addition to, not instead of, the Secretary's prosecution of his case. *Marshall* v. *OSHRC*, *supra*.

way" of dealing with the case, delays the abatement requirement that the settlement would make immediately effective.[7]

d. Petitioners dispute (Pet. 19-21) the relevance for present purposes of the provision of Section 10(c) limiting the grounds on which employees may challenge a citation that is not contested by the employer. However, that limitation, which permits an employee challenge solely with respect to the reasonableness of the abatement period, is plainly germane. While the Act does not expressly answer the question of employees' challenge rights once an employer withdraws its notice of contest, Section 10(c) does provide the answer in the most closely analogous situation—where the employer has not contested the citation in the first place. It would be anomalous if employees could challenge a citation on grounds other than the reasonableness of the abatement time in the former situation, but not the latter. As the Second Circuit has concluded, "[t]here is no justification for such an anomaly under the legislative plan of the Act or its legislative history." *Donovan* v. *OSHRC*, 713 F.2d at 929 (footnote omitted).

e. Finally, petitioners question (Pet. 21-22 n.25) whether the Secretary's settlement of citations without hearings before the Commission effectuates the basic remedial purpose of the Act—the rapid abatement of hazardous working conditions. See *Donovan* v. *OSHRC*, 713 F.2d at 927. They claim that there is no evidence that settlements were discouraged or that the abatement of hazards was delayed by Commission review during the eight-year period when

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[7]The delay engendered by proceedings before the Commission on a settlement is also inconsistent with employees' statutory right to contest a citation where they believe that an unreasonably long period of time has been allowed for abatement of a violation. See *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d at 1186 & n.18.

the Secretary submitted his settlements for Commission approval. Petitioners fail to note, however, that during that time, the Commission did not permit hearings on employee objections to settlements, except where the objections concerned the reasonableness of the abatement date. See *id.* at 921. Since avoiding the burdens of litigation is one of the reasons for settling cases, employers would be less willing to reach agreement with the Secretary if they could still be forced into litigation by employees. Moreover, since the Commission now permits intervening employees to contest citations on grounds other than the reasonableness of the abatement period (see *id.* at 921-922), it seems clear that the review process will take longer and that abatement, which is stayed during Commission proceedings, will be further delayed.[8] As the court below noted (Pet. App. 23a), the "unworkable result" that this would produce "is no small consideration [since] * * * roughly nine out of every ten cases are settled prior to a hearing."

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[8]The two cases petitioners attack as having incorrectly "invoked policy considerations," *Donovan* v. *International Union, Allied Industrial Workers, supra,* and *Donovan* v. *OSHRC, supra,* are good examples of the delay that results from Commission review. In *Donovan* v. *International Union, Allied Industrial Workers, supra,* the Commission took over three years to disapprove the settlement. See 722 F.2d at 1417. In *Donovan* v. *OSHRC, supra,* Commission review took over four years. See *Secretary of Labor* v. *Mobil Oil Corp.*, 10 O.S.H. Cas. (BNA) 1905 (1982). Indeed, in the instant case, the Secretary and the company executed the settlements in November 1980 and January 1981 (Pet. App. 32a, 38a), more than two years before the Commission issued the order reviewed by the court of appeals (*id.* at 25a). None of these employers was required to institute the abatement called for by its agreement with the Secretary during these extended periods.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

DOJ-1984-04

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